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In the Supreme Court of the United States

October Term, 1946.

LOUISE MCGREW MOFFETT AND LOUISE MCGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased, *Apellants,*

VS.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, B. C. HOWARD AND WILLIAM H. KOPP, *Appellees.*

No. 318.

Appellants respectfully suggest that the matter contained in this document also aids in the solution of the jurisdictional question.

APPELLANTS' MOTION PRAYING THAT THE COURT ORDER THAT MATTER DESIGNATED BY APPELLEES BE NOT PRINTED

Appellants state that appellees have filed herein a document entitled

> "Appellees' Designation of Additional Parts of the Record Which They Think Material to Be Printed on This Appeal."

The matters designated are neither material nor relevant to the issues herein. Said designation, though filed, was not a part of the record in the state court, and could not be considered by the state court on demurrer, and should not be printed as an alleged part of the record on this appeal.

The appeal herein is from a judgment affirming a judgment of the Circuit Court of Jackson County, Missouri, rendered after, without notice, it had erroneously sustained demurrers to appellants' pleading (154-323). For said reason the Supreme Court of Missouri was limited to the consideration of the allegations of the petition and demurrers.

That rule is stated in *Graves* v. *Graves*, 255 Mo. 468, thus, l. c. 480:

> "We can only consider the allegations of the petition and the demurrer."

At l. c. 479:

> "This matter cannot be considered here. This case stands here upon a demurrer to the plaintiff's petition. * * * We must adhere to the allegations of the petition here. If it states facts for relief, we must sustain it, although outside of the record before us there may be other facts detrimental to plaintiff's alleged cause of action. These matters might be raised by answer, but not by general demurrer."

This Court likewise limits itself to a consideration of appellants' pleading herein and the demurrers on the particular ground on which they were sustained by the state court.

Appellees' designated matters merely impose the burden upon Mrs. Moffett of unnecessarily paying for

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printing more than 506 useless pages, and on the clerk the burden of superintending such printing, and on the Court itself the useless task of reading same. For said reason said matters should not be printed.

The Missouri court was precluded by Missouri law from basing its judgment on alleged judicial notice of the matters in said designation.

State ex rel. v. *Eastin*, 270 Mo. 193, l. c. 210, ruled:

> "We take notice of a former appeal and of the record thereof (*Keaton* v. *Jorndt*, 259 Mo. 179); but we do not notice the facts and records in one action when called on to rule another and separate one (*Spurlock* v. *Railroad*, 76 Mo. 67; *Banks* v. *Burman*, 61 Mo. 76; 16 Cyc. 918)."

Knorp v. *Thompson*, 352 Mo. 44, l. c. 52, declared:

> "It is not just that a court should, in deciding the issues of a case, consider evidence introduced in another and different case, and thus decide a case upon evidence which a party had been afforded no opportunity to refute."

This Court, in *Stewart* v. *Masterson*, 131 U. S. 151, l. c. 158, and in *Pacific R. R. of Mo.* v. *Mo. Pacific R. Co.*, 111 U. S. 505, l. c. 518, stated the same rule.

Furthermore, appellees' demurrers admit (*Truax* v. *Corrigan*, 257 U. S. 312, l. c. 324) that said matters were overt acts pursuant to the conspiracy to deprive Mrs. Moffett of the right secured by the Constitution and laws, and are here governed by the rule that

> "A matter, the validity of which is in issue in legal proceedings, cannot be set up as a bar thereto." (Broom's Legal Maxims, 8th Ed., l. c. 133.)

Wherefore, appellants pray that this Honorable Court order that the desigation of additional parts in said document entitled

> "Appellees' Designation of Additional Parts of the Record Which They Think Material to Be Printed on This Appeal"

be not printed.

A. E. WATSON,
MARTIN J. O'DONNELL,
Attorneys for Appellants.

NOTE: The following deals with the question of jurisdiction, and of itself establishes that the motion to dismiss should be denied, and appellees' designation of 506 pages of unnecessary matter which they say they think should be printed, should be ordered not printed.

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SUGGESTIONS IN SUPPORT OF MOTION FOR ORDER THAT THE UNNECESSARY MATTER DESIGNATED BY APPELLEES BE NOT PRINTED.

I.

Appellants file the above motion and these Suggestions before the disposition of appellees' pending motions for the reason that it appears from the certified transcript, appellees' statement opposing jurisdiction, their motion to strike, and their reply to appellants' response to said motion to strike, the parties are entitled to be heard. Therefore the record must be printed. The additional matter the appellees have designated to be printed, should not be printed for the reasons stated in the motion and because it was not properly part of the record. The documents designated consist of 506 pages of matter improperly included in the transcript.

Appellees' demurrers admit the allegations of appellants' pleadings, and appellees cannot support their demurrers by said extrinsic and unnecessary matter, nor can the Court consider same.

Said papers were found amongst the files in the case. This Court has ruled:

> "The mere fact that a paper is found among the files in a cause does not of itself make it a part of the record. If not a part of the pleadings or process in the cause, it must be put into the record by some action of the court. *Sargeant* v. *State Bank,* 12 How. 371, 387, 13 L. Ed. 1028, 1033; *Fisher* v. *Cockerell,* 5 Pet. 248, 254, 8 L. Ed. 114, 116."

Said motion should be sustained at this time for the reason that it now appears that appellees agree that the

facts in the record are such as to entitle both parties to a hearing on the merits.

II.

Appellees, on page 3 of their reply, state their idea of what an inherently federal question is, which differs from what this Court has stated to be "an inherently federal question" in *Swofford* v. *Templeton*, 185 U. S. 492, quoted on page 14 of the Jurisdictional Statement. The same question is discussed at page 10 of the Jurisdictional Statement in a quotation from *First National Bank* v. *Anderson*, 269 U. S., l. c. 346, thus:

> "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of Federal law."

The motion to dismiss thus directed to that sort of Federal question can never be sustained because Federal questions of that kind are always substantial, as pointed out in *Brown* v. *Equitable Life Ass'n*, 185 U. S., l. c. 311. It follows that the statement by this Court, "it must take jurisdiction if it should," (*Cohens* v. *Virginia*, 6 Wheat., l. c. 404) applies to this case.

III.

On page 6 of appellees' suggestions opposing jurisdiction, they say:

> "* * * the only Federal question which the Supreme Court of Missouri had occasion to pass upon, and did pass upon * * * was the contention that Section 948, R. S. Mo. 1939, was in effect a bill of pains and penal-

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> ties and a violation of the provisions of Article I, Section 10, of the Federal Constitution, which prohibits a state from passing a bill of attainder."

On page 109 appellees say:

> "Wherefore, appellees respectfully submit this statement showing that the questions upon which the decision in this case depends are so unsubstantial as not to need further argument, and appellees respectfully move the court to dismiss this appeal, or in the alternative, to affirm the judgment of the Supreme Court of Missouri."

Appellees thus agree that the state court did pass on a Federal question on page 6. On page 109 they (agreeing that there is more than one Federal question) say "the *questions*" on which this case depends are so unsubstantial as not to need further argument. But, in their response to the citation they contradict the above by telling this Court that if it rules against their motion, then that said Federal questions are so substantial that they desire to file briefs and to be heard orally before the Court in argument of the Federal questions, which they now say

> "are so unsubstantial as not to need further argument."

They also ask the Court to affirm the judgment. This, however, it cannot do and at the same time grant their request for the additional argument which they say is not needed. In their reply to appellants' response they say (p. 27):

> "The non-Federal ground of misjoinder, under the then applicable Missouri Code of Civil Procedure was adequate, was the sole ground of decision relied

> upon by both the State Circuit and Supreme Courts, after disposal by the Supreme Court of the frivolous and nonsubstantial questions as to Sec. 948, R. S. Mo. 1939."

They thus admit that the record shows that the state court passed upon a Federal question, and claim that it also decided a non-Federal question. This Court says that under such circumstances the appeal will not be dismissed, nor the judgment reversed or affirmed, without a hearing. In *Baltimore & Ohio R. R. Co.* v. *Maryland*, 20 Wall. 643, this Court held where the record shows a decision of a state court on a Federal question properly presented, and of which the court could take jurisdiction, and shows also a decision of a local question, the writ of error will not be dismissed on motion in advance of the hearing. The parties are entitled to be heard on the soundness of the decision below on the Federal question, on the sufficiency of that question to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment, even if the Federal question was erroneously decided.

> "The counsel of both parties in this court are entitled to be heard when the record shows the existence of a decision which gives us jurisdiction, on the soundness of that decision, on its sufficiency to control the judgment in the whole case, and on the sufficiency of any other point decided, to affirm the judgment even if the federal question was erroneously decided."

Hence, since both parties have requested a hearing, and since appellees admit that a Federal question or questions was or were decided by the state court, but argue that a local question was also decided after the decision of the

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Federal question, it is apparent, under the above authority (*B. & O. R. R. Co.* v. *Maryland*) that the record must be printed and the cause heard on briefs and oral argument.

To the end that unnecessary expense may not be incurred, or the parties or the Court subjected to the labor of reading the unnecessary matter designated by appellees for inclusion in the printed record, that this Court should order that it not be printed.

IV.

On page 4 of appellees' reply they say that appellants never claimed the right to sue jointly until appellees' statement opposing jurisdiction suggested that appellants make such claim.

This is a most singular contention. To begin with, the physical fact that appellees devoted many pages to the futile contention that appellant could not sue in both capacities under the Federal law, indicates that appellants must have made the claim somewhere. The question is—where? Appellants' pleading first raised said question. It is still alive.

The allegations of the fifth amended petition, as amended, in paragraph 19 thereof (224-225) refers to the deprivation of the rights guaranteed to appellants as to privileges and immunities, due process and equal protection of the laws, including Sections 51 and 52 of Title 18. It is there alleged that appellees:

> "• • • by reason of the injury thus caused plaintiff, became liable to said plaintiff under and by virtue of Sections 43, 47 and 48, Title 8, United States Code, the protection of which Constitution and statutory provisions the plaintiff here and now invokes."

It is also made at other pages. By suing in both capacities, Mrs. Moffett raised the Federal questions and made the claim, and by arguing in their suggestions that she could not do so, they admitted of record that Mrs. Moffett had thus made the Federal claim. As pointed out in *Loeb* v. *Columbia Township*, 179 U. S. 472, and *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, a proper way for either party to raise a Federal question is by pleading, thus making the question part of the record, showing that the claim was presented to the court.

In *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, l. c. 308, it is said on that subject:

> "The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. *Loeb* v. *Columbia Twp.*, 179 U. S. 472."

Mrs. Moffett, in other places in said pleading (154-323), further specially set up and claimed her right to sue in both capacities for the loss occasioned by the violation of her constitutional and statutory rights.

Had there not been a Civil Rights Act, Mrs. Moffett could do so under the principle applied in *Bell* v. *Hood*, 90 L. Ed. 758.

In *Fertilizer Co.* v. *Hyde Park*, Fed. Cas. No. 10336, cited in *Picking et al.* v. *Railroad et al.*, 251 Fed. (2d) 240, it was held that a corporation could base its suit on the Civil Rights Act for the reason that a corporation is a person, within the meaning of the XIVth Amendment, created by law. The same rule authorizes an executor to sue.

Appellees claim that such persons cannot jointly sustain injuries from the same wrongful acts. To state the proposition is to refute it. The "question whether a

right or privilege claimed under the Constitution or laws of the United States was distinctly and sufficiently *pleaded* and brought to the notice of a state court is itself a Federal question, in the decision of which this Court on writ of error is not concluded by the view taken by the highest court of a state" (*Carter* v. *Texas*, 177 U. S. 442). As pointed out in the Jurisdictional Statement (pp. 7-8):

> "The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiff's legal rights under the 14th Amendment, we are at as full liberty to consider them as was the state Supreme Court." (*Truax* v. *Corrigan*, 257 U. S. 312, l. e. 324.)

The demurrer admitted that Mrs. Moffett in both capacities sought to recover under the Federal law.

Appellees claim that the assignments of error do not raise the question that the right to sue jointly in this case was afforded by the Civil Rights Statutes is as barren of merit as their claim that a *pleading* cannot raise a Federal question. They overlook the consideration that the Civil Rights Statutes were enacted to enforce the rights secured by the XIVth Amendment by any person, under color of a statute of any state. And so assignment 23 (937) that:

> "23. The court erred in holding that appellants' rights, under the Constitution and Laws of the United States, were not denied to her by the judgment dismissing the case on an alleged ground of misjoinder of parties plaintiff,"

preserves the question. See, amongst other assignments preserving the question, 20 and 34.

The error could only be claimed as to the Constitution and laws mentioned in the record, which laws included the Civil Rights Acts.

Their claim on this question is as utterly baseless as their claim that the Federal questions, which the state court held were not "germane" to the finding of misjoinder, were not considered decided by the state court when it decided that they were not "germane." It could not so decide unless it considered and decided them, for, again to quote Judge Sherwood on a kindred question:

> "*Whenever the sufficiency of the evidence is considered, necessarily you must consider its insufficiency. The two are inseparable in thought.*" (*State* v. *Cushenberry*, 157 Mo. 168.) (Court's italics.)

V.

This Court, in *Magwire* v. *Tyler*, 17 Wall. 253, l. c. 286; the Supreme Court of Missouri, in *Beattie Mfg. Co.* v. *Gerardi*, 166 Mo. 142, l. c. 153 and 155, and the Missouri appellate court, in *Purdy* v. *Pfaff*, 104 Mo. App. 331, l. c. 339, have expressly held that Section 922, R. S. Mo. 1939, did not authorize a demurrer on any ground save those set forth therein which never included the ground of misjoinder of parties.

This Court quoted the section as it was in 1873, and thus decided as to a case involving a Federal right in a state court, that the Missouri Supreme Court could not deny a Federal right by resorting to the Code of Civil Procedure of the state as an excuse for denying it.

The Honorable Frank Hagerman, relying thereon in *Armour* v. *Roberts*, 151 Fed. 846, joined the administrator, guardian and heirs in that case, and was sustained therein by one of the great judges of the nation. Mr. Hagerman

was one of the great lawyers of the nation, as shown by his retension as chief counsel in *Wilson* v. *New*, 243 U. S. 332.

The opinion of this Court, in *Magwire* v. *Tyler*, was incorporated in Section 922 as much as if written therein by the seven revisions since 1873 without a change. And the opinions in the above Missouri cases were likewise embodied therein by virtue of four revisions thereafter.

In said constructions this Court, in 1873, and the Missouri court, in the years 1901 and 1904, held that:

> "No other grounds of demurrer are allowed by the statutory rules of pleading." (*Magwire* v. *Tyler*, 17 Wall. 253, l. c. 286.)
>
> "* * * no pleading is demurrable unless it is subject to one or more of the objections specified in the provisions of the Code defining the grounds of the demurrer." (*Beattie Mfg. Co.* v. *Gerardi*, 166 Mo. 142, l. c. 153.)
>
> "Section 598, Revised Statutes 1899, *supra*, specifies the grounds upon which a pleading may be demurred to, and nothing not specified in it can be a ground therefor." (*Beattie Mfg. Co.* v. *Gerardi*, 166 Mo. 142, l. c. 155.)
>
> "Under the Code, the office of a demurrer is the same as it was at common law, it still is directed to the legal effect of the pleading for defects apparent on the face of the pleading, *but is confined in range to the statutory limits*. Bliss, Code Pleading, Sec. 404; *Beattie Mfg. Co.* v. *Gerardi*, 166 Mo. 142." (*Purdy* v. *Pfaff*, 104 Mo. App. 331, l. c. 339.)

In *Ex Parte Carey*, 306 Mo. 287, the *court* en banc said of the construction of two statutes and the effect of revision thereafter, l. c. 294:

> "This construction has been acquiesced in by the Legislature for more than thirty years. Not only that,

> but the Legislature, after such judicial construction had been placed upon Section 4092, reincorporated it without change or amendment into two subsequent revisions of the statutes, thereby adopting the construction. *The construction has therefore become a part of the statute itself.* If the statute as so constructed does not measure up to the requirements of adequate law enforcement, as now conceived, *the remedy lies with the Legislature* rather than with this court."

See, also, *Sanders* v. *St. Louis & N. O. Anchor Line*, 97 Mo. 26, l. c. 30-31; *Kansas City Public Service Co.* v. *Ranson*, 328 Mo. 524, l. c. 536. Sutherland on Statutory Construction, 2d Ed., Sec. 403, points out that said rule of statutory construction is universal.

The Missouri rule as to the effect of revisions of statutes after construction is the same as that followed by this Court.

In *Georgia Railway & Electric Co.* v. *City of Decatur*, 295 U. S. 165, it is held, l. c. 170, that the construction by the highest court of a state of one of its statutes

> "• • • becomes part of the statute as much as though it were found in appropriate words in its text."

And so the state court was without jurisdiction to sustain the demurrer on the ground of misjoinder of parties plaintiff. And hence the alleged non-Federal ground is not broad enough to sustain the judgment. Nor was it an independent ground because so interwoven with the Federal questions as to be incapable of separate treatment and determination, and consequently the alleged non-Federal ground of the decision being plainly untenable, cannot defeat review.

Ward v. *Love County*, 253 U. S. 17.
Abie State Bank v. *Bryan*, 282 U. S. 765.
Lawrence v. *State Tax Commission*, 286 U. S. 276, 282.

Especially since the state court cannot legally render the same judgment on reversal and remand, because the statutes on which the state court acted are no longer in force, and the new statutes prohibit the same judgment.

In *Murdock* v. *Memphis*, 20 Wall. 590, this Court said, l. c. 635:

> "But in the other cases supposed, why should a judgment be reversed for an error in deciding the Federal question, if the same judgment must be rendered on the other points in the case? And why should this court reverse a judgment which is right on the whole record presented to us; or where the same judgment will be rendered by the court below, after they have corrected the error in the Federal question?"

Answering its own question, the court then pointed out that if the state court had power to render the same judgment after reversal by this Court because of the erroneous decisions of the Federal questions by the state court, then that this Court would not render a judgment which would simply be, l. c. 635:

> "* * * a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, * * *"

In *Herb* v. *Pitcairn*, 324 U. S. 117, this Court applied the same rule applied in *Murdock* v. *Memphis* as a reason

for refusing to reverse because of erroneous decision of Federal questions by the state judgment and said, l. c. 125-126:

> "We are not permitted to render an advisory opinion, *and if the same judgment would be rendered by the state court after we corrected its views of Federal laws,* our review could amount to nothing more than an advisory opinion."

In view of the fact that the Missouri Supreme Court in its opinion declares

> "Section 922, *although now repealed,* was in force on December 30, 1944, the date Judge Ridge ruled on the demurrers,"

and in view of the fact that the Supreme Court in its opinion points to the new Civil Code, Mo. Laws 1943, pp. 353-397, as declaring that it went into effect "on January 1, 1945," and not before, thus:

> "This code will take effect on *January 1, 1945,*"

it follows that both the Legislature of the state and its Supreme Court have declared that the new code repealed the old law under which the state, circuit and Supreme Court acted, and substituted therefor the positive command that on January 1, 1945, and thereafter the Missouri courts must obey the command that

> "Misjoinder of parties is not ground for dismissal of an action,"

then said new code, as interpreted by the Supreme Court of the state in this case, demonstrates that the reversal because of the Federal errors would not be

> "* * * a useless and profitless reversal which can do the plaintiff in error no good and only embarass and delay the defendant."

And, furthermore, said reversal would not constitute an advisory opinion, as outlined by the above quotation from *Herb* v. *Pitcairn, supra.*

VI.

Appellees make an unfounded attack upon the abstract of the record before the Supreme Court of Missouri, now included in the certified transcript, to which answer has been made in appellants' brief at pp. 32 to 49, inclusive. We supplement that by dealing with the present form of said attack. On pp. 13-14 of their reply they say:

> "In Appellants' Brief on page 33 and at the top of page 36 are repeated quotations of a purported recital on page 406 of the Record as printed in the Missouri Supreme Court, reciting that without evidence, notice, hearing or jurisdiction, the circuit court entered the challenged judgment of dismissal. The mentioned paragraph is obviously an interpolation by counsel who prepared the record. No court ever stultified itself by authorizing a record of its proceedings to be made, showing that the court was preceeding to enter a judgment without hearing evidence or arguments, and in the absence of notice and jurisdiction to act."

Appellees seem to think that if a judge commits an error, then that his act in authorizing a record showing the truth as to what he did amounts to a stultification.

It is evident that what Judge Ridge did when he allowed the bill of exceptions was to authorize a record of the proceedings to be made showing that he entered a judgment without hearing, evidence or argument, and in the absence of notice and jurisdiction to act. By doing so Judge Ridge merely did his duty.

As pointed out on pages 32-33 of appellant's brief, appellees failed to avail themselves of the method provided by Section 1194, R. S. Mo. 1939, to correct an abstract of the record. That they were fully familiar with the method is shown by the fact that they filed a counter-abstract which never questioned the recital on page 406. It also appears that said counterabstract was filed on December 6, 1945, while their motions questioning the correctness of the abstract were filed on October 29 and 30, 1945 (446-456).

In this connection we direct attention to suggestions filed by appellants on November 16, 1945, and included in the certified copy of the transcript of the record (466-476) as to what the law of the state was on the question.

Appellees now say that "following a procedure authorized by *Yellow Mfg. Acceptance Corp.* v. *American Taxicabs,* 340 Mo. 1200" (that case will be found in 344 Mo.), they moved to strike said paragraph. That that decision did not authorize them to file a motion to strike said recital in this case is shown by the opinion in that case, from which it appears that the abstract there stricken was stricken because it was not served in time, l. c. 1210:

> "• • • on the grounds that it was not served within the time required by our Rule II • • •".

Not having been served in time, it was no part of the record.

Appellees state (p. 14) that the state court:

> "• • • in effect upheld present appellees' motion by ruling that the challenged judgment 'is correct in form and in accordance with law.' "

In other words, they again beg the question. It is because the judgment is not correct in form, nor in accordance with the law, that this case is here on appeal, and appellees again violate Broom's maxim on the subject. Furthermore, there is not a syllable in the opinion that justifies such assertion.

In *Badger Lumber Co.* v. *Knights of Pythias,* 157 Mo. 366, l. c. 379-380, referring to the statute which provides a method for correcting an abstract, the court said, l. c. 380:

> "Moreover, it provided within itself a method to prevent imposition on this court, by requiring respondent, if dissatisfied, to file an additional abstract within a certain time, and if the parties could not concur as to the record, the clerk should certify to this court so much of the record as is in dispute."

Goode v. *Coal Company,* 179 Mo. App. 207, points out that an abstract can not be questioned by evidence otherwise than as provided by the statute, saying, l. c. 210:

> "The statute (Sec. 2048, R. S. 1909) clearly points out that if an appellant's abstract is not satisfactory to the respondent, the latter shall file an additional abstract. If this is not accepted by the appellant he must specify his objection in writing and the original record will be ordered up for inspection by the court."

In *State ex rel. Crider* v. *Wagers,* 47 Mo. App. 431, l. c. 437, it is said:

> "If the course indicated in this statute had been taken by defendants, then we would have been able to decide whether the relator's abstract is true or false in respect to the disputed particulars; but, as it

> is, *we must accept the same as correct, notwithstanding the challenge of the defendants.*" (Italics ours.)

In *Muehlebach* v. *Muehlebach Brewing Co.*, 242 S. W. 174, at page 176 the opinion says:

> "While there is some controversy as to whether these matters did or did not happen in the presence of the jury, in view of the fact that respondent's abstract of the record shows that they did not, we must take the recitals in respondent's abstract to be true."

So that, in and of itself alone, said recital destroyed the judgment. But it is supplemented by the bill of exceptions, signed by Judge Ridge and made part of the record, more definitely and exactly showing how and in what manner Judge Ridge violated appellants' Federal rights by proceeding without the notice or hearing required by the rule and the law as a condition precedent to jurisdiction to decide the demurrers or render the judgment rendered.

Appellees claim, on page 5 of their reply, that under heading "Appellants' Claim A Refuted":

> "Section 948, R. S. Mo. 1939, authorized no judgment which would bar a future action on the same facts, and the judgment rendered was proper thereunder. (Statement Opposing Jurisdiction, pp. 18, 19, 20.)"

In answer we say, the trial judgment was in effect to "Go hence without day." If this would not prevent another action, Judge Clark's opinion certainly would, for it definitely decides that appellants

> "• • • have not only had their day in court, but their months and years."

In the case of *Swing* v. *Furniture Company*, 150 Mo. App. 574, the court said of an identical judgment under the same statute, l. c. 582:

> "The judgment entered in the present instance purports to be final in that it directs that the plaintiff take nothing by his suit and that the defendant go hence without day, recover treble costs and have execution therefor. The principle is well established that where a matter has been once finally adjudicated the parties to the action are for all time precluded from raising that question again. * * * The statute above referred to authorizes the court, upon sustaining the third demurrer, to do no more than enter the usual judgment on demurrer, give judgment for the penalty of treble costs and dismiss the petition, thus leaving the plaintiff free to institute a new suit if he chooses to do so. (*Gordon* v. *Burris*, 125 Mo. 39, 28 S. W. 191; *Bennett* v. *Southern Bank*, 61 Mo. App. 297.)"

And, therefore, the 506 pages of the transcript designated by appellees should not be printed, and we respectfully submit that this Court should so order.

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